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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1109~~ 56

INTERSTATE CIRCUIT, INC., et al.,
Appellant,

v.

CITY OF DALLAS,
Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee City of Dallas has asked that this appeal be dismissed because a substantial federal question is not presented and because the first question was not timely and properly raised.

The first question is found on page 3 of the Jurisdictional Statement. From the beginning of the litigation, Appellant has claimed that Dallas City Ordinance No. 11284 did not guarantee a prompt final judicial decision to confirm the ac-

tion of the Board. In the trial court, as defendant, it raised this point by special exception (Appendix C-10 and 11); and in that court as cross-plaintiff it raised the same point as grounds for the injunctive relief which it sought. (Appendix C-13 and 14).

Since this case was a non-jury trial, no motion for rehearing was required, Tex. Rul. Civ. Proc. 418b and 374. As an appeal from an order granting a temporary injunction against appellant, no Finding of Facts and Conclusions of Law were required. Tex. Rul. Civ. Proc. 385e.

To avoid encumbering this record by the repetition of points covered in its original brief, which were repeated in the motion for rehearing, Appellant said, "A Motion for Rehearing by Interstate re-urged the identical points of the first brief. (Appendix C, p. 22.)" This statement is unchallenged by appellee. The Petition for Writ of Error brought forward the same constitutional points.

In every court below Appellant has urged its contention that the ordinance did not guarantee a prompt final judicial determination to satisfy the requirement of *Freedman v. State of Maryland*, 380 U.S. 51 (1965). In its Motion to Dismiss, the City concedes that the Court of Civil Appeals considered the point. (Motion to Dismiss, p. 12).

This court in *People of State of New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), said:

> "* * * no particular form of words or phrases is essential, but only that the claim of invalidity and the grounds therefor be brought to the attention of the

> state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

At every level in the state courts Apellant has presented its contention that the ordinance does not satisfy the requirements of *Freedman*.

The federal questions are substantial. Appellee's claim that this is a "classification" ordinance "and not a censorship ordinance" doesn't change its character. A cursory reading shows that it restricts free communication to persons under sixteen. There is the obvious dispute as to whether this procedure is constitutional. The infringements of Appellants rights under the First and Fourteenth Amendments presented as questions on page 3 of the Jurisdictional Statement are substantial federal questions.

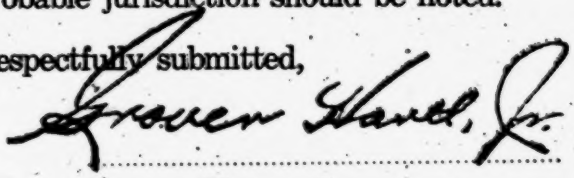
The Appellee's statement on page 6 of its Motion to Dismiss—"Even though City of Dallas was not requested to do so, it * * * cooperated * * * (Appellant's Jurisdictional Statement, Page 8.)" deserves comment. Attorneys for the City promised cooperation from the beginning of this litigation. They are honorable lawyers. Appellant believed them. They kept their promise without written request or demands. The City deserves no credit for promises kept; Appellant was not derelict in its trust. The quoted statement without this explanation may lead to the inference that Appellant didn't try to push its appeal in state court for prompt, final judicial decision.

The only conclusion properly drawn is that diligent attorneys for the City of Dallas and an exhibitor cannot get the Texas courts to give a prompt final judicial determination on a decision of the classification board.

Neither the City of Dallas nor Interstate has the authority to enact a statute providing for prompt judicial determination; they, even by joint effort, cannot get a priority hearing from the Supreme Court of Texas.

The questions presented here are substantial and properly before the Court. Probable jurisdiction should be noted.

Respectfully submitted,



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PROOF OF SERVICE

I, Grover Hartt, Jr., one of the attorneys for Interstate Circuit, Inc., Appellant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 13th day of April, 1967, I served copies of the foregoing Appellant's Brief in Opposition To Motion to Dismiss on the several parties thereto, as follows:

1. On Appellee City of Dallas, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. N. Alex Bickley, City Attorney, 301 Municipal Building, Dallas, attorney of record for the City of Dallas:

2. On Intervenor United Artists Corporation, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Mr. Paul Carrington, 1900 Mercantile Dallas Building, attorney of record for United Artists Corporation.

Grover Hartt, Jr.

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